

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
IN TACOMA

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UNITED STATES OF AMERICA, )  
 )  
Plaintiff, ) No. CR15-5351RBJ  
 )  
vs. )  
 )  
JAY MICHAUD, )  
 )  
Defendant. )

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MOTIONS HEARING

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BEFORE THE HONORABLE ROBERT J. BRYAN  
UNITED STATES DISTRICT COURT JUDGE

May 5, 2016

**APPEARANCES:**

Keith Becker  
U.S. Department of Justice Criminal Division  
Matthew Hampton  
Assistant United States Attorney  
Representing the Plaintiff

Colin Fieman  
Linda Sullivan  
Federal Public Defender's Office  
Representing the Defendant

09:32:48AM 1 THE COURT: This is further in United States  
09:32:52AM 2 versus Michaud, No. 15-5351. Present for this hearing is  
09:33:02AM 3 Mr. Michaud and his lawyers, Ms. Sullivan and Mr. Fieman;  
09:33:07AM 4 and for the government, Mr. Becker and Mr. Hampton.  
09:33:12AM 5 Right?

09:33:13AM 6 MR. HAMPTON: That's correct, your Honor.

09:33:15AM 7 THE COURT: Also, I understand Special Agent Alfin  
09:33:19AM 8 is on the telephone so he can hear these proceedings as  
09:33:23AM 9 well.

09:33:26AM 10 This comes on on the plaintiff's motion for  
09:33:30AM 11 reconsideration, which is Docket No. 165. I have  
09:33:36AM 12 determined that I should give the government the benefit  
09:33:38AM 13 of the doubt on this request for reconsideration. I think  
09:33:47AM 14 it is a close question, but under Local Criminal  
09:33:52AM 15 Rule 12(c)(2)(a), I think they are -- they desire to  
09:34:02AM 16 present new facts which could not have been brought to the  
09:34:05AM 17 court's attention with reasonable diligence.

09:34:08AM 18 I guess that's a way of saying plaintiff's counsel was  
09:34:12AM 19 diligent in their choice not to submit evidence that now  
09:34:17AM 20 they wish to offer. That may be more tactics than  
09:34:26AM 21 anything, but it seems to me in the interest of a full and  
09:34:34AM 22 fair hearing on the merits that I should reconsider my  
09:34:43AM 23 prior ruling in the order granting the third motion to  
09:34:45AM 24 compel discovery.

09:34:51AM 25 You know, in motions to reconsider we speak of them as

09:34:55AM 1     though when they are granted, the relief underlying the  
09:35:00AM 2     motion for reconsideration is granted. Really, when you  
09:35:06AM 3     make a motion for reconsideration, you are asking the  
09:35:08AM 4     court to reconsider its prior ruling. I am going to do  
09:35:12AM 5     that. The motion should be granted to that extent. But  
09:35:18AM 6     the ruling granting the motion for reconsideration should  
09:35:23AM 7     not be read as, of course, leaning one way or another on  
09:35:28AM 8     the underlying issue. We will just take another look at  
09:35:31AM 9     it.

09:35:31AM 10        Now, as part of the motion to reconsider, which was  
09:35:35AM 11     Docket 165, the plaintiffs have requested leave to present  
09:35:43AM 12     Federal Rules of Criminal Procedure 16(d)(1) evidence. I  
09:35:50AM 13     am satisfied from the showing made that the plaintiff has  
09:35:56AM 14     made a sufficient showing to justify an in camera  
09:35:59AM 15     presentation.

09:36:03AM 16        Such proceedings should be and are rare, because they  
09:36:10AM 17     fly in the face of due process considerations. But the  
09:36:15AM 18     rule allows it and the showing is sufficient, and so the  
09:36:20AM 19     court will grant leave for such a presentation.

09:36:25AM 20        MR. FIEMAN: Your Honor, I don't suppose it is  
09:36:28AM 21     necessary for me --

09:36:30AM 22        THE COURT: I can't hear you.

09:36:32AM 23        MR. FIEMAN: Let me step up to the platform. Your  
09:36:35AM 24     Honor, I was just wondering if it was necessary for the  
09:36:38AM 25     record for us to note our objection to that ruling, or is

09:36:41AM 1 it assumed from our prior pleadings?

09:36:43AM 2 THE COURT: I understand you object. I  
09:36:45AM 3 understand. There is some ground rules for such a  
09:36:49AM 4 hearing. First, the rule contemplates a written statement  
09:36:52AM 5 only. I am not going to conduct an evidentiary hearing  
09:36:55AM 6 in camera, although I may question plaintiff's counsel  
09:37:03AM 7 ex parte after I review their presentation.

09:37:10AM 8 It should be noted this is not a Classified  
09:37:12AM 9 Information Procedure Act hearing, but is only under  
09:37:21AM 10 Rule 16.

09:37:24AM 11 And, third, we will conduct this proceeding in the  
09:37:28AM 12 jury room in camera and ex parte.

09:37:34AM 13 Now, you should understand, I think, where we are  
09:37:39AM 14 going from here. After the in camera proceeding I will  
09:37:45AM 15 rule on the question of whether the information that was  
09:37:50AM 16 ordered produced -- by the order granting the third motion  
09:37:53AM 17 to compel should be produced to the defendant or whether  
09:37:56AM 18 it may be withheld by the government.

09:38:01AM 19 If I order production, that will essentially end this  
09:38:07AM 20 hearing and motion for reconsideration, and would amount  
09:38:14AM 21 to a denial of the motion -- the underlying motion for  
09:38:20AM 22 reconsideration.

09:38:20AM 23 If I allow the government to withhold the evidence, we  
09:38:24AM 24 will then proceed with the pending motion to strike under  
09:38:28AM 25 Docket 193, and argument on the materiality of the

09:38:32AM 1 withheld information, and what sanctions, if any, are  
09:38:37AM 2 appropriate. That includes the pending defendant's motion  
09:38:45AM 3 to dismiss.

09:38:47AM 4 Now, that's how we are going to proceed this morning.  
09:38:52AM 5 So we will recess this court proceeding, and the court  
09:38:58AM 6 reporter and I will go into the jury room, and Mr. Rucker  
09:39:02AM 7 or one of plaintiff's counsel can also come in.

09:39:10AM 8 MR. HAMPTON: Your Honor.

09:39:12AM 9 THE COURT: Mr. Hampton.

09:39:13AM 10 MR. HAMPTON: The information security officer has  
09:39:20AM 11 asked if we could have about ten minutes to prepare the  
09:39:22AM 12 jury room, and then make the materials available to the  
09:39:26AM 13 court.

09:39:27AM 14 THE COURT: Whatever it takes. As soon as that is  
09:39:34AM 15 completed we will come back to court. Mr. Rucker, I guess  
09:39:42AM 16 if you will let me know when it is all set up.

17 (At this time the ex parte in camera proceeding  
10:11:33AM 18 followed.)

10:11:33AM 19 THE COURT: It is my judgment that the showing  
10:11:35AM 20 made in camera is sufficient, and the government is not  
10:11:41AM 21 required to produce the information that was ordered  
10:11:48AM 22 produced in the order granting the third motion to compel.

10:11:53AM 23 So let's turn our attention to the question also  
10:11:59AM 24 raised in the motion for reconsideration as to the  
10:12:06AM 25 materiality of that information, and what sanctions, if

10:12:11AM 1 any, might be appropriate if the government does not  
10:12:17AM 2 produce the information, the source code, and so forth.  
10:12:25AM 3 It is your motion.

10:12:26AM 4 MR. FIEMAN: Your Honor, just to see where we are  
10:12:30AM 5 on the record, are we moving now on the motion to  
10:12:33AM 6 dismiss --

10:12:33AM 7 THE COURT: Wait a minute.

10:12:36AM 8 MR. FIEMAN: Are we moving now to the  
10:12:40AM 9 consideration on the motion to dismiss and possible  
10:12:42AM 10 sanctions?

10:12:43AM 11 THE COURT: I would assume we will address that.

10:12:45AM 12 MR. FIEMAN: I am unclear whose motion you are  
10:12:48AM 13 referring to and who should speak first. That's what I  
10:12:50AM 14 was trying to clarify.

10:12:50AM 15 THE COURT: The motion for reconsideration comes  
10:12:52AM 16 first.

10:12:53AM 17 MR. FIEMAN: Thank you, your Honor.

10:13:00AM 18 THE COURT: I should tell you, I have reread all  
10:13:03AM 19 of the original papers in the original motion, and in the  
10:13:11AM 20 second motion to compel, most of them twice or three  
10:13:20AM 21 times, and all of the supporting documents. It is well  
10:13:25AM 22 over an inch, nearly two, of paper. So anything you want  
10:13:30AM 23 to add to the showing you have made in your briefing?

10:13:36AM 24 MR. HAMPTON: Thank you, your Honor. The first  
10:13:47AM 25 point I think we would note is that in light of the

10:13:50AM 1 court's finding the government is not obligated to turn --

10:13:53AM 2 THE COURT: I don't think I have my hearing aids  
10:13:58AM 3 adjusted right. A lot of problems go along with being  
10:14:05AM 4 old. Speak into the mic.

10:14:08AM 5 MR. HAMPTON: Can your Honor understand me now?

10:14:11AM 6 THE COURT: You've got it right. Go ahead.

10:14:13AM 7 MR. HAMPTON: Yes, your Honor. The first point  
10:14:15AM 8 the government would make then is, in light of the court's  
10:14:17AM 9 finding the government is not obligated to turn this  
10:14:19AM 10 material over, that in fact no sanction would be  
10:14:23AM 11 appropriate. The government has made a showing as to the  
10:14:27AM 12 law enforcement privilege. The government believes that  
10:14:30AM 13 balancing the government's interests in nondisclosure  
10:14:33AM 14 against the defendant's need weighs in favor of the  
10:14:36AM 15 government, and certainly does not justify any sanction.

10:14:41AM 16 In particular, that is because the government  
10:14:44AM 17 continues to believe that the defendant simply has not  
10:14:47AM 18 made that materiality showing. The defense argues that it  
10:14:52AM 19 needs this information to verify the NIT data. The  
10:14:56AM 20 government has provided ample opportunity and discovery  
10:15:00AM 21 for the defense to make just that analysis.

10:15:05AM 22 It has the data obtained by the NIT, it has the NIT  
10:15:09AM 23 code that got that data from Mr. Michaud's computer, and  
10:15:14AM 24 the government is, as noted previously, willing to make  
10:15:20AM 25 available that network data, the network data that would

10:15:23AM 1 show exactly what was sent from Mr. Michaud's computer by  
10:15:29AM 2 the NIT to the government. So if the concern is about  
10:15:31AM 3 verifying the government's information, the defense has  
10:15:33AM 4 all it needs to do.

10:15:35AM 5 Now, in response, what we have heard from the defense  
10:15:38AM 6 is, well, that is all well and good, but that network  
10:15:41AM 7 data, that is a red herring, that doesn't matter. What is  
10:15:44AM 8 important, though, is the defense hasn't actually looked  
10:15:47AM 9 at that network data. It has so far declined to  
10:15:50AM 10 investigate that, and has simply said in conclusory  
10:15:54AM 11 fashion, both counsel -- defense counsel and also in an  
10:15:59AM 12 expert declaration, that that data simply wouldn't help.

10:16:02AM 13 But the government has looked at that. Special Agent  
10:16:06AM 14 Alfin looked at the network data. He confirmed that the  
10:16:09AM 15 information that the government sent -- pardon me, the  
10:16:13AM 16 information that the government received from the NIT for  
10:16:18AM 17 Mr. Michaud's computer -- or what was ultimately  
10:16:22AM 18 determined to be Mr. Michaud's computer was exactly what  
10:16:27AM 19 the NIT sent to the government when it was deployed to  
10:16:30AM 20 Mr. Michaud's computer.

10:16:32AM 21 The defense, of course, also says that it needs this  
10:16:35AM 22 discovery, because absent that, how can it know if the  
10:16:41AM 23 government exceeded the scope of its search. Well, your  
10:16:47AM 24 Honor, as the government has stated, it did not. The NIT  
10:16:51AM 25 seized several pieces of specified information and



10:16:57AM 1 recorded them. And that's all it did. The defense had  
10:17:00AM 2 the code that actually conducted that search, seized that  
10:17:04AM 3 information. It can confirm whether or not in fact the  
10:17:09AM 4 code did what the government says it did. And at no point  
10:17:13AM 5 has the defense suggested that the code did otherwise.

10:17:18AM 6 At most, what the defense has been able to put forth  
10:17:21AM 7 is the theoretical possibility that the government could  
10:17:26AM 8 have exceeded the scope of its warrant. Well, the same  
10:17:31AM 9 could be said, frankly, of any warrant.

10:17:34AM 10 The fact is, when the government obtains a warrant to  
10:17:37AM 11 search a home, any defendant could say, while you were  
10:17:40AM 12 there seizing the drugs that you had probable cause to  
10:17:43AM 13 seize, you also seized some special property that I care  
10:17:47AM 14 deeply about, and that you had no authority to take.

10:17:51AM 15 Short of the government saying we did not and we don't  
10:17:54AM 16 have it, I don't know what more certainty we can provide  
10:17:57AM 17 to the defense. I say that not to be flip. I understand  
10:18:02AM 18 the defense's concern, but to simply claim that it is  
10:18:06AM 19 possible that the government exceeded the scope of a  
10:18:08AM 20 search warrant is no answer to the question of  
10:18:11AM 21 materiality.

10:18:12AM 22 And I would also note that even if the government did  
10:18:16AM 23 exceed the scope of its warrant -- and it did not -- but  
10:18:20AM 24 if it did, if in fact the government seized some  
10:18:23AM 25 information that it was not entitled to, the remedy would

10:18:28AM 1 be suppression of that information, information that I am  
10:18:31AM 2 not aware of and that the government does not intend to  
10:18:34AM 3 use. And so verifying the scope is not a reason for this  
10:18:40AM 4 discovery.

10:18:41AM 5 And, finally, the defense says, well, we need this  
10:18:43AM 6 information because it is possible that a virus or malware  
10:18:49AM 7 is responsible for the thousands of images of child  
10:18:56AM 8 pornography organized into folders found on Mr. Michaud's  
10:18:58AM 9 computer.

10:18:59AM 10 The government agrees it is a theoretical possibility.  
10:19:03AM 11 The defense is free to make that argument. It is free to  
10:19:07AM 12 analyze the devices to see if there is any trace of this  
10:19:12AM 13 supposed malware or this virus that could have done this.  
10:19:17AM 14 The defense is free to argue to a jury that that is  
10:19:22AM 15 exactly what happened. The government will in turn be  
10:19:26AM 16 free to present its own evidence of user attribution, the  
10:19:31AM 17 evidence of where the materials were found, what was found  
10:19:37AM 18 on them, and the jury can decide. That is why we have  
10:19:42AM 19 trials.

10:19:45AM 20 But it is not for the defense to simply say, well, I  
10:19:48AM 21 would really like to know what else the government has,  
10:19:51AM 22 because if I do, then I will know whether or not there was  
10:19:56AM 23 malware on my computer. It simply doesn't make sense.  
10:19:59AM 24 There is no support for that position in the record. And  
10:20:04AM 25 the defense has made no showing. Indeed, the defense

10:20:07AM 1 hasn't even reviewed those devices, to the government's  
10:20:10AM 2 knowledge.

10:20:13AM 3 The government has made that point several times, and  
10:20:16AM 4 the defense has responded most recently with new  
10:20:19AM 5 declarations. I would note specifically the declaration  
10:20:22AM 6 of Mr. Young, in which he says --

10:20:24AM 7 THE COURT: I meant to -- You have a motion to  
10:20:28AM 8 strike pending on those additional things that we should  
10:20:33AM 9 resolve.

10:20:34AM 10 MR. HAMPTON: Yes, your Honor. What I would  
10:20:37AM 11 ask -- I will turn to that right now then, just so it is  
10:20:40AM 12 clear. The government believes at this point that  
10:20:44AM 13 striking those motions would be appropriate, given that  
10:20:47AM 14 there has been ample opportunity to present them.

10:20:50AM 15 If the court is not inclined to do that -- Although I  
10:20:54AM 16 am prepared to respond to the best of my ability at this  
10:20:57AM 17 time, the government hasn't had an opportunity to share  
10:21:00AM 18 those declarations with its own technical experts and  
10:21:05AM 19 determine what, if any, response is appropriate. And so  
10:21:07AM 20 if the court is not inclined to strike those declarations,  
10:21:11AM 21 and if the court considered those declarations meaningful  
10:21:14AM 22 or important in its ultimate determination, the government  
10:21:18AM 23 would simply ask for an opportunity to provide some  
10:21:21AM 24 rebuttal declaration from its own technical expert, as  
10:21:26AM 25 appropriate.

10:21:29AM 1 Your Honor, to turn back to Mr. Young's declaration,  
10:21:34AM 2 his response --

10:21:34AM 3 THE COURT: I don't think you ought to go into  
10:21:36AM 4 that until I determine the motion to strike.

10:21:40AM 5 MR. HAMPTON: Pardon, your Honor? Oh, yes, of  
10:21:44AM 6 course, your Honor.

10:21:56AM 7 Your Honor, then that leaves the matter -- the  
10:22:04AM 8 ultimate matter of sanction, if in fact the court is  
10:22:07AM 9 unpersuaded as to the government's position on materiality  
10:22:13AM 10 and the effect of the law enforcement privilege here. If  
10:22:16AM 11 the court does believe that some sanction is appropriate  
10:22:20AM 12 and reflects the appropriate balancing of the interests of  
10:22:22AM 13 the parties, then the government would certainly  
10:22:25AM 14 respectfully suggest that dismissal of the indictment in  
10:22:28AM 15 its entirety is not appropriate.

10:22:32AM 16 What the defendant is prevented from doing is  
10:22:37AM 17 receiving discovery that he claims is relevant to the NIT.  
10:22:40AM 18 And so the appropriate sanction there is to deny the  
10:22:44AM 19 government use of the evidence obtained by the NIT at  
10:22:46AM 20 trial.

10:22:48AM 21 THE COURT: Well, all of the evidence was obtained  
10:22:51AM 22 by the use of the NIT, was it not?

10:22:54AM 23 MR. HAMPTON: Well, your Honor, the evidence  
10:22:57AM 24 obtained by the NIT established the finding of probable  
10:22:59AM 25 cause that led to the search warrant.

10:23:02AM 1 To be clear, the government's position is that what  
10:23:05AM 2 the government should be barred from doing at trial is  
10:23:08AM 3 presenting specifically the information obtained by the  
10:23:12AM 4 NIT and its attribution to Mr. Michaud. So instead, leave  
10:23:16AM 5 the government in the position of presenting its case  
10:23:20AM 6 based on the search that was conducted of Mr. Michaud's  
10:23:23AM 7 home and the evidence found therein.

10:23:26AM 8 THE COURT: The search was based on what was found  
10:23:29AM 9 by the NIT, right?

10:23:33AM 10 MR. HAMPTON: The probable cause finding  
10:23:35AM 11 supporting the search, in part -- mostly relied on  
10:23:39AM 12 information obtained from the NIT, that is true.

10:23:46AM 13 Your Honor, that would be a separate question from  
10:23:48AM 14 whether the evidence obtained by the NIT is admissible --  
10:23:52AM 15 the actual data obtained by the NIT would be admissible at  
10:23:55AM 16 a trial to, say, prove that the IP address the government  
10:24:00AM 17 identified was in fact tied to Mr. Michaud. And that  
10:24:03AM 18 would be a separate question.

10:24:07AM 19 And the government acknowledges that this would be --  
10:24:12AM 20 It would certainly not be a normal presentation at trial.  
10:24:16AM 21 In the normal case, where the government has other  
10:24:18AM 22 information that explains the story of its investigation,  
10:24:23AM 23 it would normally present that. But it also understands  
10:24:26AM 24 if the court believes a sanction is the appropriate  
10:24:29AM 25 outcome here, that then it will have to accept that it

10:24:34AM 1 cannot tell the full story, and that the jury would need  
10:24:37AM 2 to hear only about the evidence obtained from  
10:24:41AM 3 Mr. Michaud's home.

10:24:43AM 4 The government also recognizes, as noted in its  
10:24:46AM 5 pleadings, that if the court were to impose such a  
10:24:49AM 6 sanction, it would likely place the government in the  
10:24:53AM 7 position of having to dismiss one of the counts in the  
10:24:55AM 8 indictment, and that is Count 2, one of the two receipt  
10:25:01AM 9 counts, because that count is premised on attribution --  
10:25:05AM 10 largely premised on attribution that would come from the  
10:25:10AM 11 NIT and from Mr. Michaud's activity on Playpen -- his  
10:25:14AM 12 alleged activity on Playpen.

10:25:16AM 13 We understand that may well be the final outcome of  
10:25:18AM 14 that sanction. But that is the most to which the defense  
10:25:21AM 15 would be entitled, because the remaining evidence that was  
10:25:24AM 16 obtained from Mr. Michaud's home is not tied to the NIT,  
10:25:33AM 17 and it would be appropriate for a jury to consider.

10:25:51AM 18 Your Honor, given the court's suggestion as to the  
10:25:56AM 19 matter of the declarations, I will leave it there at this  
10:25:58AM 20 point.

10:26:00AM 21 THE COURT: Just a second. What do you make of  
10:26:08AM 22 the Ninth Circuit cases, in particular United States  
10:26:11AM 23 versus Hernandez-Meza, that tend to indicate that  
10:26:20AM 24 inculpatory information is material even if it only tells  
10:26:30AM 25 the defendant that he might as well abandon defenses and

10:26:35AM 1 plead guilty?

10:26:36AM 2 MR. HAMPTON: Well, your Honor, I acknowledge that  
10:26:39AM 3 the Ninth Circuit has made such pronouncements. I don't  
10:26:43AM 4 believe that in this case the discovery that is at issue  
10:26:47AM 5 would shed really any light on whether or not there is a  
10:26:51AM 6 viable defense. And certainly --

10:26:53AM 7 THE COURT: How does the defense know that?

10:26:56AM 8 MR. HAMPTON: Well, your Honor, the defense -- one  
10:27:02AM 9 way the defense could know that is to at least examine the  
10:27:05AM 10 devices that are at issue here to determine if in fact  
10:27:08AM 11 there is any evidence, any factual support, for its claim  
10:27:12AM 12 that somehow someone or something else is what placed the  
10:27:17AM 13 child pornography on these devices.

10:27:20AM 14 The most the defense can say is that is a theoretical  
10:27:24AM 15 possibility, and that because it is a theoretical  
10:27:26AM 16 possibility they would like to know more about certain  
10:27:29AM 17 information that the government has, but that has no  
10:27:33AM 18 bearing on that.

10:27:34AM 19 The real answer as to whether or not there is any  
10:27:37AM 20 evidentiary support for such a theory can be found by  
10:27:41AM 21 searching those devices.

10:27:45AM 22 THE COURT: Why do they have to believe what you  
10:27:47AM 23 say about that? I mean, your briefing is full of  
10:27:58AM 24 statements that they won't find anything anyway, that it  
10:28:05AM 25 is not going to help them anyway. I guess you know what's

10:28:14AM 1 in there and they don't. And you say you don't need it.  
10:28:18AM 2 Why do they have to believe what you say?

10:28:24AM 3 MR. HAMPTON: Well, your Honor, because what  
10:28:30AM 4 they -- To take, for example, one of the pieces of  
10:28:32AM 5 information that they wish to know about, which relate to  
10:28:35AM 6 how in fact the NIT was deployed to Mr. Michaud's  
10:28:40AM 7 computer, that is one aspect of their request, there is  
10:28:48AM 8 no -- the defense has -- it does not explain how exactly  
10:28:53AM 9 that would help them know whether or not someone or  
10:28:55AM 10 something else got into Mr. Michaud's computer.

10:29:02AM 11 It would be to say that a home with an open window,  
10:29:10AM 12 someone went in the open window -- Pardon me. It would  
10:29:22AM 13 be as if -- To take, say, a lock pick example. If  
10:29:26AM 14 someone picked the defendant's lock, for the defense to  
10:29:29AM 15 say, well, we need to know how you picked our lock because  
10:29:33AM 16 someone else could have also picked our lock, and they  
10:29:36AM 17 could have planted evidence there, well, the answer is did  
10:29:40AM 18 someone plant evidence there, not how someone got in.  
10:29:42AM 19 That doesn't actually shed any light on whether or not  
10:29:45AM 20 there was some other entity that caused that harm.

10:29:54AM 21 I apologize, your Honor. I need some assistance  
10:29:57AM 22 reading a note that I received. If you will give me a  
10:30:00AM 23 moment.

10:30:17AM 24 Thank you, your Honor. The last point I will make is  
10:30:21AM 25 if the court has some concern at the end of the day that



10:30:25AM 1 some broader sanction is appropriate, given the  
10:30:28AM 2 materiality, then we would ask the court to then give us  
10:30:32AM 3 an opportunity and give the parties an opportunity to more  
10:30:35AM 4 fully brief that issue. That issue was raised in part of  
10:30:39AM 5 a response brief in the defense renewed motion to dismiss.  
10:30:43AM 6 And so a more detailed understanding of exactly what the  
10:30:46AM 7 prejudice, if any, the defendant might suffer, and how  
10:30:49AM 8 exactly that could be cured with a remedy. If the court  
10:30:54AM 9 has lingering doubts that the government's proposed  
10:30:56AM 10 sanction is insufficient, we would urge the court to ask  
10:31:00AM 11 for additional briefing to fully assess that.

10:31:06AM 12 THE COURT: Mr. Fieman, address the motion to  
10:31:08AM 13 strike first, please.

10:31:09AM 14 MR. FIEMAN: Thank you, your Honor. I think the  
10:31:11AM 15 very presentation you heard just a few minutes ago from  
10:31:14AM 16 Mr. Hampton demonstrates why we ultimately elected to  
10:31:17AM 17 submit those declarations.

10:31:19AM 18 Let me explain the posture of where we are at in  
10:31:22AM 19 trying to defend the court's original disclosure order,  
10:31:29AM 20 bolster our commitment to the dismissal that we have  
10:31:33AM 21 requested, and at the same time try and preserve some  
10:31:37AM 22 ability to work out our theories and develop our expert  
10:31:40AM 23 witnesses for trial without disclosing our entire case.  
10:31:44AM 24 It has been a very difficult act to balance that.

10:31:47AM 25 The government has from its initial pleadings back in

10:31:50AM 1 January -- And the court has to remember where this  
10:31:53AM 2 started. We requested this discovery in September. The  
10:31:57AM 3 government filed a motion opposing it. It then withdrew  
10:32:00AM 4 that motion, said they would turn it over, submitted a  
10:32:02AM 5 proposed protective order, then gave us a mere fragment of  
10:32:05AM 6 what was covered by the discovery agreement. We had a  
10:32:09AM 7 hearing, the court found materiality.

10:32:12AM 8 The government then requested until March 28th to work  
10:32:16AM 9 out its internal agency and bureaucratic process, and  
10:32:20AM 10 discuss additional protective measures with the defense,  
10:32:23AM 11 with a deadline of March 28th for production. On  
10:32:26AM 12 March 28th we get the motion to reconsider. And now we  
10:32:29AM 13 are in the position of re-briefing, as I tried to outline  
10:32:32AM 14 in the original pleadings, issues that we thought the  
10:32:34AM 15 court had already resolved. Because the standard here  
10:32:37AM 16 isn't even materiality. It is whether the discovery is  
10:32:40AM 17 relevant and helpful to the defense, in ways the court  
10:32:43AM 18 already pointed out.

10:32:44AM 19 Let me just focus on that, your Honor, because there  
10:32:47AM 20 are two aspects, which is the pretrial aspect --

10:32:48AM 21 THE COURT: Wait a minute. Wait a minute. Let's  
10:32:50AM 22 talk about the motion to strike.

10:32:51AM 23 MR. FIEMAN: I apologize, your Honor. We  
10:32:53AM 24 submitted that -- That's the reason we submitted it. We  
10:32:55AM 25 got yet again a pleading on May 6th, repetitively saying

10:33:01AM 1 that we have not demonstrated a need.

10:33:05AM 2 In that, also, in direct response to our motion to  
10:33:07AM 3 dismiss, was a proposal that Mr. Hampton has made for a  
10:33:10AM 4 lesser sanction. That lesser sanction only works to the  
10:33:13AM 5 government's advantage.

10:33:15AM 6 And what we felt we needed to demonstrate further if  
10:33:18AM 7 the court was considering a lesser sanction was how this  
10:33:23AM 8 discovery -- the entire discovery issue goes to the heart  
10:33:26AM 9 of the defense case. It is not simply a matter of carving  
10:33:29AM 10 out discussion of the NIT. This is the core of our  
10:33:35AM 11 defense, is wrapped up with this discovery.

10:33:37AM 12 And to the extent that the government proposed in its  
10:33:40AM 13 May 6th reply that a lesser sanction is appropriate, we  
10:33:43AM 14 decided that despite the fact that we did not want to  
10:33:46AM 15 continue putting our experts before the government with  
10:33:49AM 16 sworn statements pretrial, despite the fact that we were  
10:33:53AM 17 reluctant to continue making demonstrations of our defense  
10:33:56AM 18 theories after the court had already ruled that we had  
10:33:59AM 19 made a sufficient showing of materiality, the issue was  
10:34:02AM 20 simply too important.

10:34:03AM 21 Now, if the government wants more time to respond, and  
10:34:06AM 22 the court deems that appropriate, and that is the court's  
10:34:09AM 23 decision, we do not object.

10:34:11AM 24 If we -- We suggested that this could be converted to  
10:34:13AM 25 a surrebuttal, which the court has previously allowed

10:34:16AM 1 parties to submit, even one day before, we make that  
10:34:19AM 2 motion.

10:34:19AM 3 But the core of this, your Honor, is that it is not  
10:34:22AM 4 supposed to be a mini-trial. The court is not supposed to  
10:34:25AM 5 be assessing at this point whose experts are more  
10:34:28AM 6 persuasive, whether the defense has a theory that is  
10:34:33AM 7 ultimately going to persuade the jury. That is what the  
10:34:37AM 8 trial itself is for.

10:34:39AM 9 The standard here is simply do we have a good-faith  
10:34:42AM 10 basis for believing the discovery, which the court last  
10:34:44AM 11 already ordered the government to produce, is essential to  
10:34:48AM 12 Mr. Michaud getting a fair trial.

10:34:49AM 13 And we believe that the government's repeated  
10:34:51AM 14 invitation, even in its prior pleading, in its response to  
10:34:55AM 15 our motion to dismiss, forced us over that weekend to  
10:34:57AM 16 decide do we disclose more, do we present more, do we hold  
10:35:01AM 17 back for trial. Quite frankly, we are uncomfortable being  
10:35:05AM 18 in this position to begin with, given the court's  
10:35:08AM 19 February 17th ruling. But we elected on that morning to  
10:35:11AM 20 file our remaining declaration so there is a complete  
10:35:14AM 21 record.

10:35:15AM 22 Now, I don't know what more to say on that point, your  
10:35:18AM 23 Honor, except to explain the position we were in and the  
10:35:20AM 24 reasons we filed it. And we also believe it is directly  
10:35:23AM 25 responsive as a reply briefing to the government's May 6th

arguments in relation to the motion to dismiss and the proposed sanctions.

THE COURT: Let me just address the motion to strike. You put in additional evidence as part of your reply, basically. They had no chance to respond to that. For purposes of this hearing today those -- that additional evidence should be stricken. Those are the attachments to Docket No. 191, and Part A of the defendant's reply to the government's response to the second defense motion to dismiss the indictment.

If those things should be considered in terms of what sanctions, that's a different issue.

MR. FIEMAN: That's what we are proposing, your Honor.

THE COURT: This question now that we are talking about requires that those things not be considered by the court.

MR. FIEMAN: Your Honor, that's fine. You already ruled on the relevance and helpful issue.

THE COURT: Pardon me?

MR. FIEMAN: You have already ruled on the question of whether the proposed discovery is relevant and helpful. So to the extent --

THE COURT: I know what my previous ruling is. The question here is whether it was correct, and what I

10:36:54AM 1 should consider is the stuff that is properly submitted,  
10:36:58AM 2 not stuff that comes in after the fact.

10:37:02AM 3 MR. FIEMAN: Your Honor, I must strongly object to  
10:37:04AM 4 that for several reasons. One is, the government was on  
10:37:07AM 5 notice that we would consider submitting supplemental  
10:37:10AM 6 declarations after the May 6th pleading, and they have the  
10:37:13AM 7 same option. The court has previously allowed the  
10:37:16AM 8 government to file a surrebuttal on this discovery issue  
10:37:18AM 9 on February 16th, by the government, for the February 17th  
10:37:23AM 10 hearing --

10:37:24AM 11 THE COURT: No. You are telling me you disagree  
10:37:25AM 12 with me. I appreciate that. Go ahead with your argument  
10:37:29AM 13 on the question of materiality or relevance.

10:37:32AM 14 MR. FIEMAN: That's fine, your Honor. So what we  
10:37:35AM 15 are -- At this juncture now, it seems to me, the bottom  
10:37:37AM 16 line of what is going on here is that the court is trying  
10:37:40AM 17 to balance three competing and legitimate interests.

10:37:44AM 18 The first is the government's need to investigate  
10:37:47AM 19 internet crimes. We have never disputed that that is a  
10:37:51AM 20 fair and legitimate law enforcement purpose.

10:37:55AM 21 Mozilla is here today wanting to protect its  
10:37:58AM 22 customers. There is enormous privacy interests at stake.

10:38:01AM 23 Mr. Michaud would like a fair trial that is not based  
10:38:04AM 24 on speculation about how he was targeted, and allows the  
10:38:07AM 25 defense to fully present its defense at the trial. Only

10:38:14AM 1 one set of those interests is founded on the Constitution.  
10:38:18AM 2 All right. What is fundamentally at stake here is  
10:38:22AM 3 Mr. Michaud's right to a fair trial.

10:38:24AM 4 The government, as we have said all along, has the  
10:38:28AM 5 right to withhold the discovery, ultimately, if the court  
10:38:32AM 6 decides that is appropriate. But that does not resolve  
10:38:36AM 7 the fundamental tension here. And that's why we put in  
10:38:40AM 8 our pleading, your Honor, that even if the ex parte  
10:38:43AM 9 proceeding established the worst possible potential harms  
10:38:47AM 10 from disclosure, we are in the same position.

10:38:52AM 11 And the Supreme Court said in Jencks, almost 50 years  
10:38:55AM 12 ago -- And I am quoting directly from the opinion, "It is  
10:39:00AM 13 unconscionable to allow the government to undertake  
10:39:04AM 14 prosecution and then invoke its governmental privilege to  
10:39:08AM 15 deprive the accused of anything" -- This is in the  
10:39:13AM 16 Supreme -- "of anything that might be material to the  
10:39:15AM 17 defense."

10:39:16AM 18 Now, it is rare that we find in our courts this kind  
10:39:20AM 19 of impasse. And we have strived mightily over the last  
10:39:24AM 20 eight months since we put in this discovery request to  
10:39:28AM 21 reach some accommodation with the government. They  
10:39:32AM 22 submitted a proposed protective order. And then -- I  
10:39:35AM 23 don't know whether that was simply a misdirection, or  
10:39:38AM 24 whatever, but apparently they are not satisfied with that.  
10:39:40AM 25 They will now not turn it over under any circumstances.

10:39:44AM 1 We have agreed, consistent even with Mozilla's own privacy  
10:39:48AM 2 interests, to abide by any security conditions they think  
10:39:50AM 3 are appropriate and the court approves. Any. There is  
10:39:53AM 4 nothing more we can offer.

10:39:55AM 5 And if there is any doubt about how critical this  
10:39:57AM 6 is -- I refer to the operator of this browser itself, who  
10:40:04AM 7 has informed the court now in its pleading that the  
10:40:06AM 8 information contained in the declaration of Special Agent  
10:40:10AM 9 Alfin -- It has nothing to do with our declaration. It  
10:40:12AM 10 is from Special Agent Alfin's declaration -- suggests that  
10:40:16AM 11 the government exploited the very type of vulnerability  
10:40:19AM 12 that would allow third parties to obtain total control --  
10:40:23AM 13 this is Mozilla, total control of an unsuspecting user's  
10:40:27AM 14 computer. That's our defense. That's what we believe  
10:40:31AM 15 happened here.

10:40:32AM 16 Because right now Mr. Michaud stands an innocent man.  
10:40:35AM 17 There is a presumption of innocence here. No matter how  
10:40:38AM 18 much the government wants to say, oh, we found pictures  
10:40:40AM 19 here, we found pictures there, we are starting from a  
10:40:42AM 20 presumption of innocence.

10:40:44AM 21 And we have clearly established that the key issue,  
10:40:47AM 22 given this technology, goes beyond even the pretrial  
10:40:50AM 23 issues of whether this was a suppression (sic) warrant  
10:40:54AM 24 properly founded on probable cause, whether the government  
10:40:57AM 25 has disclosed everything in its warrant application that



10:41:00AM 1 it was supposed to, which we know they have routinely not  
10:41:04AM 2 done -- not done with sophisticated technology in other  
10:41:06AM 3 cases in recent years. It goes to the heart of our  
10:41:09AM 4 defense.

10:41:10AM 5 And what the government would very much like with its  
10:41:12AM 6 proposed sanction is that the jury doesn't really hear  
10:41:15AM 7 very much about the government's malware. And I can see  
10:41:18AM 8 us standing at trial, trying to argue to the jury, ladies  
10:41:21AM 9 and gentlemen, you have heard that Mr. Michaud's computer  
10:41:27AM 10 was attacked by malware. We are telling you that even  
10:41:31AM 11 according to the experts, the people who make this  
10:41:34AM 12 browser, and all the other experts who the court has seen  
10:41:36AM 13 in our supplemental declarations, and will be testifying  
10:41:40AM 14 at trial, that this opens up a Pandora's box of security  
10:41:46AM 15 issues and third-party attacks. But the government  
10:41:48AM 16 doesn't want you to hear about that, and we really can't  
10:41:50AM 17 tell you anything more about it, your Honor, because we  
10:41:52AM 18 haven't seen what they did to the computer.

10:41:54AM 19 The idea that we can reverse engineer this is  
10:41:57AM 20 something that we discussed back in February as an  
10:41:59AM 21 impossibility. And the government has never disputed  
10:42:01AM 22 that. You can't reverse engineer this.

10:42:04AM 23 So, your Honor, it is both a question of fairness in  
10:42:12AM 24 pretrial -- Honestly, quite frankly, we are very  
10:42:15AM 25 skeptical about the government's assurances. I am not

10:42:18AM 1 saying I am skeptical of Mr. Hampton's assurances, or  
10:42:22AM 2 Mr. Becker's assurances, or Agent Alfin's assurances.  
10:42:25AM 3 They are the AUSAs and the case agents assigned to this  
10:42:28AM 4 case. I have interacted -- I know they are operating in  
10:42:30AM 5 good faith. That is not the issue. They are not even in  
10:42:32AM 6 the loop on most of this stuff. They are not  
10:42:35AM 7 technically-trained agents.

10:42:35AM 8 You have seen not a single declaration from a  
10:42:38AM 9 qualified expert or somebody who is working at the FBI  
10:42:42AM 10 research facility that even addresses our preliminary  
10:42:44AM 11 issues about the identifiers and chain of custody issues,  
10:42:47AM 12 basic issues, of which now over the course of the last  
10:42:50AM 13 nine months the government has done nothing more than  
10:42:52AM 14 repeat and repeat and repeat again, make a showing,  
10:42:55AM 15 Mr. Michaud, make a showing. And then when we continue to  
10:42:58AM 16 supplement it, they ask for those showings to be stricken.

10:43:02AM 17 I don't know what more we can offer the court except  
10:43:04AM 18 to spell out much more than we are normally required to in  
10:43:07AM 19 terms of just showing relevance and helpfulness, where we  
10:43:10AM 20 think this trial is going.

10:43:12AM 21 So for the government to say, oh, that is not a good  
10:43:15AM 22 theory, they don't need the identifiers, they can  
10:43:19AM 23 reconstruct this from things that our experts say are  
10:43:21AM 24 relevant, are relevant to the core technical issues that  
10:43:24AM 25 we are dealing with.

10:43:26AM 1 Frankly, your Honor, it puts us in an impossible  
10:43:28AM 2 position. And that is a position that the Supreme Court  
10:43:31AM 3 has clearly stated once it is arrived at between the  
10:43:37AM 4 government's legitimate interests in investigating its  
10:43:40AM 5 crimes, its legitimate interests in wanting to be able to  
10:43:46AM 6 keep secret information secret, taking all of that at face  
10:43:50AM 7 value and in good faith, with that on one hand, and  
10:43:54AM 8 Mr. Michaud's right to present his case to the jury not  
10:43:57AM 9 built on speculation, not built on bits and pieces of  
10:44:01AM 10 testimony that has been excised -- I don't even envision  
10:44:05AM 11 how this would work. But he is entitled to present his  
10:44:08AM 12 case.

10:44:08AM 13 The Supreme Court has said, in that case, when that  
10:44:11AM 14 fundamental impasse is reached, what gives is the choice  
10:44:14AM 15 of the government, disclose or dismiss.

10:44:19AM 16 And the court was aware of this three months ago,  
10:44:23AM 17 because you told the government at that time, having  
10:44:26AM 18 established -- without any of the supplemental  
10:44:28AM 19 declarations or anything to the court's satisfaction that  
10:44:31AM 20 this evidence at issue was relevant and helpful to the  
10:44:34AM 21 defense, you told the government it seems to me you can  
10:44:36AM 22 either produce or dismiss. So the court knows the  
10:44:39AM 23 standard.

10:44:45AM 24 Your Honor, it is not just a matter of protecting  
10:44:49AM 25 Mr. Michaud's constitutional rights, which, if anything,

10:44:54AM 1 has to trump all the other interests. I mean, that's got  
10:44:57AM 2 to be it. Otherwise, what are we doing here in this  
10:45:00AM 3 courtroom if the Fifth and Sixth Amendment isn't at some  
10:45:04AM 4 point in this process going to be the deciding factor?

10:45:09AM 5 This also affects, your Honor, the court's ability to  
10:45:11AM 6 exercise effective judicial oversight over the  
10:45:15AM 7 government's exercise of law enforcement powers.

10:45:19AM 8 We are in the middle of a new and very complex age,  
10:45:24AM 9 that things like Rule 41 and the Fourth Amendment, as  
10:45:27AM 10 envisioned by the Founders, and a lot of the case law that  
10:45:30AM 11 we are relying on, didn't really anticipate.

10:45:36AM 12 But what is a guiding principle through all of that is  
10:45:40AM 13 that whatever emerging complexities surround evidentiary  
10:45:43AM 14 issues, and a defendant's right to present his case and  
10:45:47AM 15 make his arguments to a jury, is that if there comes a  
10:45:52AM 16 point where there is an irreconcilable conflict, something  
10:45:57AM 17 very clearly has to prevail on behalf of the defendant.

10:46:01AM 18 Now, let me tell your Honor it is not just about  
10:46:07AM 19 somebody sneaking into somebody's house and taking some  
10:46:10AM 20 special property. Whatever photographs or dog toys or  
10:46:15AM 21 anything Mr. Hampton was referring to in terms of search  
10:46:18AM 22 warrants, that has nothing to do with this case. Because  
10:46:22AM 23 what they want to submit is a core aspect of their  
10:46:25AM 24 evidence. All right. So judicial oversight about how  
10:46:28AM 25 they obtained and our ability to challenge the reliability

1 of their identifiers, and all the other issues that remain  
2 unanswered in this case, is a key aspect of the search  
3 itself.

4 And then, of course, there is the trial.

5 The government has not even condescended to  
6 disclose -- despite our endless efforts to reach an  
7 accommodation with them, they have not even condescended  
8 to disclose how their identifiers were generated.

9 They have given us no information whatsoever about  
10 whether there's data storage, and all of the other things  
11 that go to chain of custody, meet National Institute of  
12 Science and Technology standards.

13 They have refused to answer questions about whether  
14 their NIT went through the required vulnerabilities  
15 equities process, which is where a panel of experts is  
16 supposed to weigh the reliability and the need for this  
17 type of technology against the public interest.

18 They have refused to discuss additional protective  
19 measures.

20 And they did not seek an appeal of your February 17th  
21 order, which the court invited them to do.

22 So we are at the point, your Honor, where our ability  
23 to defend Mr. Michaud, the rubber for that is really  
24 hitting the road. And I don't make a motion to dismiss  
25 lightly. I haven't made it in any other case in my entire

10:48:03AM 1 career.

10:48:04AM 2 But what the government is proposing as a lesser  
10:48:07AM 3 sanction is only going to benefit them. Mr. Michaud is  
10:48:11AM 4 facing a five-year mandatory minimum sentence because of  
10:48:13AM 5 the way the government has elected to charge this case.  
10:48:15AM 6 There is no difference between receipt and possession,  
10:48:17AM 7 except the fact that receipt carries that hammer.

10:48:21AM 8 They would like very much to see all these cases plead  
10:48:23AM 9 out without further litigation, despite the ongoing  
10:48:27AM 10 litigation about the suppression issues.

10:48:31AM 11 And, frankly, I don't know what our options are going  
10:48:33AM 12 to be in terms of trying to prepare this case for trial at  
10:48:36AM 13 this point, if the court either vacates its prior order or  
10:48:41AM 14 declines to take the remedy that I believe the Supreme  
10:48:46AM 15 Court has said is required at this juncture.

10:48:53AM 16 We have done everything possible to put before the  
10:48:56AM 17 court our theory of defense, anticipated testimony at  
10:49:03AM 18 trial, the reasons why this information is critical both  
10:49:09AM 19 to pretrial motions and our case to the jury. We have  
10:49:14AM 20 gone far beyond the proffer required by the Ninth Circuit,  
10:49:17AM 21 which is simply a good-faith showing that it is relevant  
10:49:19AM 22 and helpful. If there is something more I can offer the  
10:49:22AM 23 court at this time to explain why this goes to the heart  
10:49:26AM 24 of the defense, we will submit it. You merely need to  
10:49:31AM 25 instruct us.

10:49:33AM 1 But short of that, and absent a dismissal, it comes  
10:49:37AM 2 down to this: Mr. Michaud is not going to get a fair  
10:49:40AM 3 trial. And that is the first time I have said it to a  
10:49:43AM 4 court. And I have no other way of putting it to your  
10:49:47AM 5 Honor at this point.

10:49:50AM 6 Your Honor, we have briefed this thing to death. It  
10:49:53AM 7 has been going on for nine months. I don't know if I need  
10:49:56AM 8 to talk any more, but I, in trying to impress upon the  
10:50:00AM 9 court we have struggled with this in good faith, and in  
10:50:03AM 10 good faith with them as well, to try to find a middle  
10:50:07AM 11 ground, I just don't know what it is.

10:50:18AM 12 THE COURT: Response.

10:50:53AM 13 MR. HAMPTON: Your Honor, we are at a point where  
10:50:59AM 14 the court has found that the government has a legitimate  
10:51:04AM 15 interest in withholding its discovery. And given that  
10:51:10AM 16 legitimate interest, given the fact that the defense  
10:51:13AM 17 simply has not shown why this discovery will aid its  
10:51:22AM 18 cause, there is no reason to go further. That should be  
10:51:26AM 19 the end of the matter.

10:51:31AM 20 To address just one aspect, and I will be brief,  
10:51:36AM 21 nothing is preventing the defense from assessing and  
10:51:40AM 22 mounting whatever defense it believes is appropriate. I  
10:51:45AM 23 do not mean to suggest that this is a trial on the  
10:51:49AM 24 validity of the defense theories. What I wanted to  
10:51:56AM 25 underscore was the defense has what it needs to test its

1 theories. If it believes that someone tampered with  
2 Mr. Michaud's devices, that someone else is responsible  
3 for what was found on those, then it should analyze those  
4 devices, it should determine the viability of that  
5 defense, and it should proceed with that defense as  
6 appropriate.

7 If it believes that instead it should argue that the  
8 government used malware on Mr. Michaud's computer and  
9 won't tell him anything about that, and the jury should be  
10 distrustful of everything the government does --  
11 everything the government did in his case, he can also  
12 proceed under that theory. It is the defendant's choice.

13 But simply because the defendant -- or the defense  
14 says that discovery is necessary or he can't possibly  
15 proceed with his defenses, just as he -- just as the  
16 defense asks the court not to take the government's word,  
17 we would ask the court not to simply accept the defense's  
18 word.

19 Discovery and materiality -- Materiality does not  
20 exist by force of will on the part of the defendant, but  
21 by an actual showing that it is relevant. The defense has  
22 what it needs to do what it says it wishes to do. And I  
23 would urge the court not to sanction the government at  
24 all.

25 THE COURT: Thank you, counsel. Just a second



10:53:34AM 1 here. Well, this question of relevance or materiality or  
10:54:21AM 2 what should be turned over to the defense under the rules  
10:54:30AM 3 is what we are talking about here. I have not changed my  
10:54:38AM 4 opinion on that based on what has been presented here on  
10:54:42AM 5 this motion to reconsider.

10:54:48AM 6 I was earlier, and still am, impressed by the material  
10:54:55AM 7 from Mr. Cirkovic. It seems to me, as I said before, that  
10:55:12AM 8 the defense has the right to know what tools you used to  
10:55:19AM 9 hack into his computer.

10:55:28AM 10 I am impressed -- I don't think anything that the  
10:55:34AM 11 government has said has overcome that showing. The  
10:55:40AM 12 response to that is substantially that the defense hasn't  
10:55:46AM 13 proved what they don't know -- they haven't proved what  
10:55:51AM 14 they don't know, but what they want to know is what they  
10:55:58AM 15 don't know so they can determine what defenses are  
10:56:00AM 16 appropriate, or, I might say, under the Ninth Circuit  
10:56:08AM 17 cases, in particular the Hernandez-Meza case, which is 720  
10:56:24AM 18 F.3d 760, they have a right to consider this information  
10:56:32AM 19 partly to determine whether it should lead to a plea,  
10:56:38AM 20 whether there are any defenses. And I think they have a  
10:56:43AM 21 right to that information.

10:56:47AM 22 I think we are right back where we were when I granted  
10:56:51AM 23 the order, with one exception, and that is the government  
10:56:54AM 24 is not required to produce this information. What  
10:57:01AM 25 difference that really makes is that the lawyers that are

10:57:03AM 1 holding it are not subject to a contempt order for failure  
10:57:07AM 2 to produce it. They have a right to hold it back.

10:57:14AM 3 It seems to me that the harder question that remains  
10:57:21AM 4 here is a question of what should be done about things as  
10:57:28AM 5 they stand, what sanctions, if any, should be imposed.  
10:57:39AM 6 The government has asked for more time on that. The  
10:57:43AM 7 defense, I think, asked me to consider the things I struck  
10:57:47AM 8 from this hearing. If you want more time, I have no  
10:57:51AM 9 objection to that. But it shouldn't be very much in terms  
10:57:56AM 10 of time.

10:58:11AM 11 MR. HAMPTON: Your Honor, would the court be  
10:58:13AM 12 willing to give the government two weeks?

10:58:16AM 13 THE COURT: A little louder.

10:58:17AM 14 MR. HAMPTON: The government would propose  
10:58:19AM 15 responding on the question of sanctions in two weeks.

10:58:31AM 16 MR. FIEMAN: Your Honor, we have no objection to  
10:58:33AM 17 any time the court deems appropriate for briefing on this  
10:58:36AM 18 issue, but we do have one concern, which we have raised  
10:58:40AM 19 previously and the court commented on in the February 17th  
10:58:43AM 20 hearing.

10:58:43AM 21 THE COURT: I'm sorry.

10:58:44AM 22 MR. FIEMAN: We do have one concern. As the court  
10:58:48AM 23 indicated, we cannot even -- if there is a plea offer from  
10:58:50AM 24 the government, we can't even assess that at this point.  
10:58:52AM 25 So we are concerned that additional time would allow the

10:58:55AM 1 government to just try and leverage the existing receipt  
10:59:00AM 2 count, with its five-year mandatory minimum, to try to  
10:59:03AM 3 shut this case down in the next few weeks. Mr. Michaud  
10:59:05AM 4 has given no indication that he wants to or could do that.

10:59:09AM 5 I would ask the court as a preliminary sanction, based  
10:59:11AM 6 on its finding this is material, that it dismiss the  
10:59:13AM 7 receipt count --

10:59:14AM 8 THE COURT: What?

10:59:16AM 9 MR. FIEMAN: The court dismiss, as a preliminary  
10:59:19AM 10 sanction, the receipt count. That would leave the  
10:59:21AM 11 possession count, which does not carry a mandatory minimum  
10:59:24AM 12 sentence.

10:59:25AM 13 We can then proceed to provide any additional  
10:59:27AM 14 information, which I think will leave the court dismissing  
10:59:30AM 15 the entire indictment. But otherwise we are twisting in  
10:59:33AM 16 the wind in a very vulnerable way because of the way the  
10:59:38AM 17 government elected to charge this case. And at a minimum,  
10:59:40AM 18 I don't think any mandatory minimum in this case should  
10:59:42AM 19 apply.

10:59:43AM 20 So that would be our preliminary request, that pending  
10:59:46AM 21 further briefing, if the government is requesting it, that  
10:59:48AM 22 the court dismiss the receipt count.

10:59:51AM 23 THE COURT: I don't think I can deal with  
10:59:53AM 24 sanctions piecemeal. It just doesn't make sense to me. I  
11:00:28AM 25 don't have a calendar in front of me.

MR. HAMPTON: Your Honor, I believe today is the 12th. Two weeks would be the 26th, if my math is correct.

THE COURT: I am thinking about laying a briefing schedule on you. The court will consider the attachments that I struck earlier, the attachments to Docket 191. Let's say any response by the government by the 20th, and any further pleading by the defense by the 26th.

Do we have time on the 27th? You want to be heard on this, I suppose. Is there any time on the 27th?

THE CLERK: 9:00 a.m. or 11:00 a.m.

THE COURT: 9:00 or 11:00.

MR. FIEMAN: Mr. Michaud is scheduled for surgery on the 26th. If we could move it up a day or two, he can be here on the 25th.

THE COURT: By move it up, you mean before that?

MR. FIEMAN: Your Honor, for example, the government's brief -- I don't know what the weekdays are, but let's say it is due on the 19th, and ours is due one week later, in trying to schedule the hearing for the 25th -- It is just he is going to be out of commission for a little while as a result of the surgery.

THE COURT: We might still be going on Young. Can we set this for 9:00 on the 25th? At 9:30 on the 25th, I will hear brief, brief, brief oral argument. The response from the government by the 19th, and anything further from

11:03:46AM 1 the defense by the 23rd -- by the end of the workday on  
11:03:54AM 2 the 23rd.

11:03:57AM 3 Further briefing should be limited to the question of  
11:04:03AM 4 sanctions based on the oral rulings that I have made  
11:04:09AM 5 today.

11:04:11AM 6 The motion to reconsider is granted in part, in that  
11:04:19AM 7 the government need not produce the code information that  
11:04:29AM 8 I requested and ordered in my previous order. But it  
11:04:35AM 9 remains that the defendant has a right to that  
11:04:41AM 10 information. So that's where we are, and we will consider  
11:04:51AM 11 sanctions on that day.

12 (Proceedings adjourned.)  
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